TO: Michigan Supreme Court Clerk
FROM: Anne Bachle Fifer
re: File 2001-33 – Proposed Amendments of Rules 2.401 and 2.410

I write to express my concern about the proposed insertion of the words "to participate in good faith" in Rules 2.401 and 2.410. My thoughts are based on my experience as a mediator, a mediation trainer, a member of the ADR Section Council of the State Bar, and a former adjunct professor of ADR and Mediation at Thomas M. Cooley Law School.

The motive of this amendment is laudable; both mediators and parties would prefer not to waste time with people who do not intend to participate in good faith.

Nevertheless, I am concerned about including the phrase in the court rule because it provides parties with one more basis for litigation. Other states that have included this phrase have experienced this. See, e.g., the cases collected in *Mediation: Principles and Practice*, Kimberlee Kovach, West Publishing Co., St. Paul, Minn., 1994, pp. 52-63. Minnesota further attempted to define "good faith" in its agriculture mediation statute, Minn. Stat. Sec. 583.27 subd.1, by offering six specific examples of "not participating in good faith." Even that failed to prevent litigation up to the appellate level. Although I have not researched this recently, my impression was that other states that had initially adopted this phrase had since abandoned it; Michigan should learn from other states' experience, rather than repeating it.

The phrase invites litigation because it is so subjective. Does it mean "intending to settle" or simply "willing to talk"? If a party refuses to move from their original stated position, have they participated in good faith? What if they discuss a couple options but then storm out after an hour? The fact that the sanctions attending failure to participate in good faith are so severe intensifies the need to be able to define it—and thus heightens the potential for litigation over this issue. Parties to a lawsuit are, by definition, at loggerheads, and we do them no favors by giving them one more topic over which to argue.

On a practical level, I also wonder how this phrase may affect the mediation itself. Will a party to a settlement conference or ADR proceeding truly change his planned behavior when he reads this phrase? Or will he behave as he intended and simply be prepared to argue why his behavior was indeed "good faith?" The phrase might be an additional tool for a mediator to use with a recalcitrant party – but it could also be another weapon for a party to hurl across the table during a tense mediation.

Certainly mediation will not be successful unless all participants are acting in good faith. But the best way to ensure that is, not by adding the phrase to the court rule, but rather by encouraging voluntary mediation. Parties who choose mediation as the process for settling their dispute will most likely settle it there, and do not need to be told to act in good faith. But parties who do not wish to be present are the ones most likely not to participate in good faith. Perhaps it is onerous enough to mandate that parties go to mediation—which the Court Rules now permit--, without additionally telling them how to behave once they get there.

In sum, the goal is laudable, but I am not persuaded that this is the way to achieve it.